Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

HOWARD WASHINGTON WOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, in calculating an offender's offense level under the Federal Sentencing Guidelines, the downward adjustment for acceptance of responsibility is correctly made from the total of the base offense level plus upward adjustments even if that total exceeds 43, even though such a method of calculation completely deprives certain offenders of any benefit for accepting responsibility in contravention of the Sentencing Guidelines' specific requirement that an offender who has demonstrated acceptance of responsibility be given a lower offense level than an offender who has not.

Whether the Federal Sentencing Guidelines violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishments when the mandatory life sentence imposed on a level 43 offender under the Guidelines is a grossly disproportionate leap in severity from offense level 42 compared to the proportionate incremental increases in severity of sentencing for all levels preceding level 43.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are those listed in the caption:

Petitioner:

Howard Washington Wood
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No. 36384053
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Lewisburg, Pennsylvania 17837

Respondent:

United States of America
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The unpublished opinion of the Court of Appeals for the Fifth Circuit, decided February 8, 1995, is included in the Appendix to this Petition, beginning at page A-1. The Order of the Court of Appeals for the Fifth Circuit, dated March 8, 1995, which denied Petitioner's petition for a rehearing is included in the Appendix, beginning at page B-1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 8, 1995. *See* Appendix A-1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit had jurisdiction over this proceeding pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. Ch. 3, Pt. E § 3E1.1(1) (Federal Sentencing Guidelines) provides, in pertinent part:

§ 3E1.1. Acceptance of Responsibility

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

18 U.S.C. Ch. 3, Pt. E, comment. (backg'd) (Federal Sentencing Guidelines) provides, in pertinent part:

> Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

18 U.S.C. Ch. 5, Pt. A, Zone D (Federal Sentencing Guidelines) provides:

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
6						12-18
7					12-18	15-21
8					15-21	18-24
9				12-18	18-24	21-27
10				15-21	21-27	24-30
11			12-18	18-24	24-30	27-33
12		12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96

22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-125	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-265
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

18 U.S.C. Ch. 5, Pt. A, comment. (n.2) (Federal Sentencing Guidelines) provides, in pertinent part:

> 2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

18 U.S.C. Ch. 2, Pt. D § 2D1.1(b)(1) (Federal Sentencing Guidelines) provides, in pertinent part:

> § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession

with Intent to Commit These Offenses); Attempt or Conspiracy

(b) Specific Offense Characteristic

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

18 U.S.C. Ch. 3, Pt. B § 3B1.1(c) (Federal Sentencing Guidelines) provides, in pertinent part:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity . . . increase by 2 levels.

The Eighth Amendment to the Constitution of the United States provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 1254 provides, in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

STATEMENT OF THE CASE

On October 6, 1992, the U.S. Attorney's office filed a superseding Indictment in the Dallas Division of the Northern District of Texas, naming Petitioner Howard Washington Wood ("Wood") among 61 defendants. The superseding Indictment charged violations of 21 U.S.C. § 846, Conspiracy (Count 1), 21 U.S.C. § 848, Continuing Criminal Enterprise (Count 2), and 18 U.S.C. § 371, Conspiracy to Structure Financial Transactions (Count 3). The government named Wood only in Count 1.

On October 4, 1993, before the government proceeded to trial, Wood entered into a written plea agreement with respect to Count 1 of the superseding Indictment, which charged him with violating 21 U.S.C. § 846, Conspiracy to Possess with Intent to Distribute and Distribution of 5 Kilograms or More of Cocaine and 50 or More Grams of "Crack" Cocaine.

On February 18, 1994, the district court held a sentencing hearing on Wood's plea to Count 1. Prior to the sentencing hearing, the government filed a Presentence Investigation Report (the "Report"). In its Report and at the sentencing hearing, the government alleged that drug transactions by Wood's co-conspirators involving between 15 and 40 kilograms of "crack" cocaine could be attributed to Wood as "Relevant Conduct" under the Federal Sentencing Guidelines (the "Sentencing Guidelines" or "Guidelines") in calculating his base offense level. The government also alleged that an upward increase in Wood's base offense level was warranted for alleged Offense Characteristics (possession of a dangerous weapon) and Aggravating Role (manager in the

conspiracy). Finally, the government recommended a two-point downward adjustment based on Wood's Acceptance of Responsibility.

Wood's base offense level based solely on the crime to which he pled guilty was 32. Base offense level 32 carries a sentencing range of 135 to 168 months (11 to 14 years). Although the evidence was insufficient to support the government's recommendations, the district court adopted the majority of the recommendations and increased Wood's base offense level to 42 and his total offense level to 43. The sentencing "range" under level 43 is **life**. As a result, the district court sentenced Wood to life imprisonment.

Wood appealed the district court's sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the life sentence. The court specifically affirmed the district court's refusal to give 27-year old Wood a meaningful benefit for his acceptance of responsibility (which would have been the difference between life imprisonment without parole and a possible 30-year sentence). The court of appeals further refused to acknowledge that the Sentencing Guidelines are internally inconsistent, resulting in unconstitutionally disproportionate sentences. Wood challenged the Fifth Circuit's Opinion in his Petition for Rehearing, which the court overruled on March 8, 1995.

REASONS CERTIORARI MUST BE GRANTED

This case involves questions of substantial importance to criminal jurisprudence that have not, but should

be, settled by this Court. The questions have significant implications for the Federal Sentencing Guidelines and will have substantial impact on the way a considerable number of cases are decided by the lower courts. With the minimal proof requirements that prevail for federal drug conspiracy charges, the extremely liberal rules relating to proof at sentencing hearings, and the expansive rules of attribution of quantities of drugs to conspiracy members, numerous federal drug conspiracy convicts will face sentencing guideline totals of 44 or more, despite their relatively incidental and limited participation in the conspiracy. If all such convicts are deprived of any benefit under the guidelines for accepting responsibility for their roles, they will not accept responsibility, and will force numerous unnecessary trials. Moreover, if they all face mandatory life sentences without parole, their punishment is cruel and unusual.

A. The Sentencing Guidelines require that offenders be given a meaningful benefit for accepting responsibility.

Under the Fifth Circuit's opinion in this case, certain defendants are completely deprived of any benefit for accepting responsibility for their crimes. The court of appeals specifically held that, when calculating a defendant's offense level under the Sentencing Guidelines, all downward adjustments (like the two-point downward adjustment Wood earned for accepting responsibility for his crime) must proceed from the total of the base offense level plus upward adjustments even if that total exceeds 43. This means that any defendant whose offense level is adjusted upward to level 45 or above gains absolutely no

benefit for accepting responsibility for his crime because his offense level will be lowered to only 43 – which is life imprisonment without the possibility of parole. This is contrary to the explicit language of the Sentencing Guidelines, which dictate that a defendant who accepts responsibility for his offense must be given a **lower** offense level than a defendant who has not demonstrated acceptance of responsibility. U.S.S.G. § 3E1.1(1)(a). In cases such as this one, where the defendant's upward adjustments result in an offense level of 45 or above, downward adjustments for acceptance of responsibility must proceed from level 43. Otherwise, a level 45 or above defendant is manifestly **not** given a lower offense level than a defendant who has not accepted responsibility.

The court of appeals' incorrect application of the Sentencing Guidelines in this regard presents the narrow question of the manner of calculating downward adjustments in cases involving offense levels in excess of 44. This question should be settled by the Court. The resolution of this question will impact lower court decisions in all future cases involving offenders with offense levels in excess of 44. Moreover, to these offenders, a decision by the Court requiring lower courts to give meaningful reductions for acceptance of responsibility will be the difference between a **mandatory life sentence** and the possibility of a sentence of years. The Court should note that if Petitioner's method of calculating the sentence is correct, the trial court will still have the **discretion** to grant a life sentence **if it believes that that sentence fits the crime**. (*See* U.S.S.G. Ch. 5, Pt. A, Zone D at Level 41, giving trial court discretion to set sentence between 360 months and life.) Petitioner believes that in calculating an

offender's offense level under the Federal Sentencing Guidelines, the downward adjustment for acceptance of responsibility must proceed from a maximum of level 43, rather than from the total of the base offense level plus upward adjustments even if that total exceeds 43. The latter method of calculation completely deprives offenders with offense levels in excess of 44 of any benefit for accepting responsibility and the Sentencing Guidelines require that an offender who has demonstrated acceptance of responsibility be given a lower offense level than an offender who has not.

Specifically, the Sentencing Guidelines provide for a two-point downward adjustment for a defendant who clearly demonstrates acceptance of responsibility for his offense. *See* U.S.S.G. § 3E1.1(a). Once the sentencing judge finds that a defendant has in fact accepted responsibility, the downward adjustment in offense level **must** be made. *See United States v. Alves*, 873 F.2d 495, 497 (1st Cir. 1989). The district court in this case found that Wood accepted responsibility for his offense. Although the court purportedly made the two point downward adjustment, its improper method of calculation completely deprived Wood of the benefit of the reduction. In effect, the district court did not make the two point downward adjustment.

The district court calculated Wood's total offense level by starting with a base offense level of 42. The court then added two points under section 2D1.1(b)(1) (possession of a dangerous weapon) and two points under section 3B1.1(c) (aggravating role), for a total of 46. Next, the district court reduced the offense level by two points for Wood's acceptance of responsibility under section 3E1.1(a), for a total offense level of 44. Finally, the district

court noted that, under the Sentencing Guidelines, "an offense level of more than 43 is to be treated as an offense level of 43," and further reduced Wood's total offense level to level 43. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table), comment. app. note 2.

The Fifth Circuit affirmed the district court's calculation in this regard and held that downward adjustments for acceptance of responsibility must proceed from the total of the base offense level plus upward adjustments even if that total exceeds 43. *See* Appendix A-14. This calculation is wrong. The **highest** Wood's total offense level can be, under a correct application of the Guidelines, is 41.

The Sentencing Guidelines require downward adjustments to proceed from level 43. Specifically, the Commentary to § 3E1.1 states that

> the reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) **is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility**.

See U.S.S.G. § 3E1.1, comment. (backg'd) (emphasis added). The Fifth Circuit's approval of the district court's calculation in this case ignores this commentary. That is, under the district court's calculation, a defendant who clearly demonstrates acceptance of responsibility for his offense is **not** given a lower offense level than a defendant who has not.

For example, using the district court's calculation, Wood (and similarly situated defendants), **who has accepted responsibility for his offense**, has the **same** offense level as a defendant with the same sentence enhancements and base **who has refused to accept responsibility for his offense**. According to the district court (and approved by the Fifth Circuit), Wood's offense level, after enhancements, was 46. Reducing 46 by two points for Wood's acceptance of responsibility, the court arrived at level 44, which it lowered to 43. According to the district court, a similarly situated (but non-repentant) defendant would have an offense level, after enhancements, of 46. This defendant having refused to accept responsibility, the district court would not have reduced his offense level to 44. The district court, however, would certainly have reduced his offense level 46 to a level 43 – which is what Wood ended up with **despite** his acceptance of responsibility.

The Fifth Circuit's justification for adopting the district court's erroneous calculation rested on its unilateral determination that proceeding downward from offense level 43 for acceptance of responsibility adjustments would, under some circumstances, have a "perverse" or "twisted" result. *See* Appendix A-4. This is so, according to the court of appeals, because, in giving a meaningful benefit for accepting responsibility, an offender who accepts responsibility whose conduct (after upward adjustments) would yield, say, an offense level 50 (if there was such a level) would be assigned a **lower** offense level (level 41) than a level 43 offender who refuses to accept responsibility. This result, according to the court of appeals, would be "perverse."

While requiring a court to proceed from level 43 with all downward adjustments once a defendant's base offense level exceeds 43 has the result, for example, of placing a convicted, but repentant, mass-murderer at level 41 while a non-repentant drug user stays at level 43, this result is not "perverse" – **the non-repentant drug user has the *same* option as the mass-murderer to accept responsibility** under the Sentencing Guidelines. Moreover, as noted above, even at Level 41 the trial court will have the discretion to assess the mass-murderer a life sentence. The result is only "perverse" to the extent the Sentencing Guidelines themselves are inherently "perverse" in grouping the mass-murderer and drug user together at level 43 in the first place. This perverseness, however, should not be addressed by a misapplication of the Sentencing Guidelines.[1]

The Sentencing Guidelines clearly intended for all defendants accepting responsibility to have a meaningful point reduction in their total offense level and, as among similarly situated defendants, for the defendant who accepts responsibility to be "appropriately given a lower offense level than a defendant who has not." *See* U.S.S.G. § 3E1.1, comment. (backg'd). The court of appeals erred in refusing to do so in this case. Wood's total offense level

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[1] In support of its refusal to give Wood meaningful credit for his acceptance of responsibility, the Fifth Circuit adopted the rationale of the Second Circuit's decision in *United States v. Caceda*, 900 F.2d 707 (2d Cir.), *cert. denied*, 114 S. Ct. 312 (1993). For the reasons stated herein, however, the Second Circuit's decision in *Caceda* on this point contravenes the clear purpose and intent of the Sentencing Guidelines.

should have been 41, not 43 – which is the critical difference between a possible 30-year sentence and a mandatory sentence of **life without the possibility of parole**. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table). This difference is particularly critical to a 27-year-old defendant such as Wood who is facing mandatory life imprisonment for his only conviction, which is based on his conduct as a youth. The Fifth Circuit's misapplication of the Sentencing Guidelines in this regard, however, impacts not only this case but the significant number of other similarly situated defendants. The Court should issue a writ of certiorari and review the judgment of the Fifth Circuit Court of Appeals.

B. The Sentencing Guidelines violate the Eighth Amendment.

The Federal Sentencing Guidelines are internally inconsistent in one respect – there is a large and wholly unexplained increase in punishment appearing between level 42 and level 43, compared with the increases between the other levels of the sentencing table. This inexplicable jump in punishment implicates the Eight Amendment's proscription against cruel and unusual punishment. The Fifth Circuit's attempt to sweep away Wood's argument in this regard by stating that the Court has upheld the constitutionality of the Sentencing Guidelines does not resolve the issue – the Court has never been faced with this specific question. With the Guidelines providing for a base (pre-enhanced) offense level of 43 for certain drug-related convictions; with the proof requirements governing federal drug conspiracy laws so

lax; with the rules of evidence inapplicable to sentencing hearings; and with the extremely liberal laws of attribution of drug quantities to conspiracy members for sentencing purposes, this inconsistency impacts the sentencing decisions of a vast number of lower court cases. *See* U.S.S.G. § 2D1.1(a). These defendants are inexplicably subjected to **mandatory** life sentences **not** because their offense levels are one level higher than an offense level carrying a punishment range of, say, 75 to 80 years imprisonment but rather because their offense levels are one level higher than an offense level carrying a punishment range of **30 years** to life. This inexplicable leap in punishment from level 42 to 43 results in unconstitutionally disproportionate sentences.

The grossly disparate increase in the severity of the sentence from level 42 to 43, as compared to the consistent incremental increase from each of the preceding levels, presents the narrow question of the constitutionality of the severity of punishment for a level 43 offender. This question should be settled by the Court. The resolution of this question will impact lower court decisions in all future cases involving level 43 offenders. The question in this case is whether the Federal Sentencing Guidelines violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishments when the life sentence imposed on a level 43 offender under the Guidelines is a grossly disproportionate leap in severity from offense level 42 compared to the proportionate incremental increases in severity of sentencing for all levels preceding level 43.

Under the sentencing table in Chapter 5 of the Guidelines, offense level 42 provides the possibility of a 360

month (30-year) sentence. If such a sentence were given, the defendant would be eligible for gain time of approximately 15 percent for good behavior in prison. *See United States v. Heath*, 840 F. Supp. 129, 130 (S.D. Fla. 1993). Under those circumstances, the defendant would be released in about 25.5 years. The next higher level, however, a sentencing level of 43, is a hope-shattering, mandatory **life sentence**, which, under the Guidelines, means life without parole. *See Id.* This large and wholly unexplained increase appearing between level 42 and level 43, compared with the increases between the other levels of the sentencing table, implicates the Eighth Amendment's proscription against cruel and unusual punishments. *See* U.S. Const. amend. VIII. *See also Heath*, 840 F. Supp. at 130.

Specifically, the offense levels under the sentencing guidelines, beginning, for example, with the minimum sentence under offense level 34 (and looking only at Criminal History Category I), increase at an average incremental rate of 3 months. That is, from offense level 34 to 35, the minimum sentence that can be imposed is increased by 17 months. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table). Then, from offense level 35 to 36, the minimum sentence increases by 20 months, which is a 3 month incremental increase in the increase from level 34 to 35. Similarly, from offense level 36 to 37, the minimum sentence increases by 22 months, which is a 2 month incremental increase in the increase from level 35 to 36. From offense level 37 to 38, the minimum sentence increases by 25 months, which is a 3 month incremental increase in the increase from level 36 to 37. Similarly, from levels 38 to 39, 39 to 40, 40 to 41 and 41 to 42, the

incremental increase in the increase from each preceding level is an average of 3 months. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table). Then, for no apparent reason, from level 42 to 43, the sentence "range" leaps to mandatory life imprisonment instead of the 3 month incremental increase seen in the progression from each of the preceding levels. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table).

If the sentencing increases in the Sentencing Table were consistent, instead of being automatically life, level 43 would be a range of 399 months to life, which is an overall 39 month increase from level 42 (level 42's increase being 36 months from level 41, plus the 3 month incremental increase). Level 44 would be increased from level 43 by 42 months, and so on. *See Heath*, 840 F. Supp. at 131. In other words, a consistent imposition of the continuing incremental trend found for the bottom of the ranges up to level 42 would have resulted in a sentencing range for Wood of 441 months (37 years) to life – a significantly less devastating sentencing range for a young man like Wood and numerous other similarly situated defendants.

The grossly disparate increase in the severity of the sentence from level 42 to 43, as compared to the consistent incremental increase from each of the preceding levels, implicates the Eighth Amendment's proscription against the imposition of cruel and unusual punishments.[2] That is, the slight difference in culpability

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[2] It also implicates the wide-spread concern about prison overcrowding that has resulted from mandatory drug sentencing under the Sentencing Guidelines. *See, e.g.*, Stephen J. Rackmill, *The Impact of Determinate Sentencing Ideology Upon Prison*

required to tip offense level 42 into level 43 and the magnitude of the sentence imposed under level 43 is unconstitutionally disproportionate to the similarly slight difference in culpability required to tip offense level 41 into level 42 and the relatively slight increase in severity of the sentence imposed under level 42. In other words, with the exception of the inexplicable jump in penalty from level 42 to level 43, the sentencing table imposes progressively – **but proportionately** – heavier sentences for progressively culpable crimes. Using the Guidelines themselves as the measure for constitutionally acceptable punishments, the leap in sentence severity from level 42 to level 43 is patently disproportionately cruel and unusual.

For example, under a section 2D1.1(b)(1) (possession of dangerous weapon) enhancement, a level 40 defendant's sentence is increased from level 40 to level 42 or from 24 to 30 years while the sentence increase for the unfortunate defendant sitting just one level higher at level 41 is from level 41 to level 43, or from 27 years

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Overcrowding, Crim. L. Bull., May-June 1991, at 230; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea For Less Aggregation*, 58 U. Chi. L. Rev. 901, 929 (1991). Prior to mandatory drug sentences, there were about 45,000 prisoners in federal institutions. As of mid-1993, there were almost 80,000 and 100,000 are expected to be imprisoned by the end of this century. According to the Bureau of Prisons, federal prisons are designed to house 38,072 inmates. *See* Theresa Walker Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 Emory L.J. 393, 418 (1991). As a practical matter, this is a problem the American people cannot afford to correct. *See* Don J. DeBenedictis, *Criminal Justice System*, A.B.A. J., Oct. 1993, at 74.

imprisonment to **life without parole**. This hope-dashing increase is disproportionately cruel and unusual measured against the punishment scheme set up by the Guidelines themselves. A relatively proportionate sentence range for the level 41 defendant with a level 43 enhanced sentence would have been 33 years to life – **not** mandatory life.

The sentencing scheme under the Guidelines, up to offense level 42, reflects a gradual, **proportionate** increase in severity of punishment that logically relates to the culpability of the defendant. The gross departure from this gradual increase seen in the jump in severity of punishment from level 42 to 43 is not logical and does not necessarily relate to the level 43 defendant's greater culpability. As a result, Wood's sentence violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishments. The unconstitutional inconsistency in this case, however, impacts not only this case but all other pending and future cases involving level 43 defendants. The Court should issue a writ of certiorari and review the judgment of the Fifth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Submitted June 6, 1995

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOWARD WASHINGTON WOOD, a/k/a "Skelly,"

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas
(3:92-CR-365-D)

(Filed Feb. 8, 1995)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Citing several errors, Howard Washington Wood appeals the life sentence imposed upon him pursuant to

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

his guilty plea to one count of 21 U.S.C. § 846, conspiracy to possess with intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base. We affirm the sentence imposed by the district court.

I

Wood was named as one of sixty-one defendants in a three-count indictment filed on October 6, 1992, in federal district court in Dallas, Texas. Wood was charged only with a violation of count one, 21 U.S.C. § 846. On October 4, 1993, on the eve of trial, Wood entered a plea of guilty to this charge.[1] We now turn to examine the events leading up to his indictment.

At the time of his indictment, Wood was twenty-six years old and had been incarcerated since July 1990 on a charge related to this conspiracy. Born in Jamaica and raised in Brooklyn, New York, Wood was involved in the Anthony Allen family cocaine distribution organization, according to this guilty plea, from December 1986 to June 1991. This Brooklyn-based organization set up various retail "crack" distribution centers, known as "traps," in the Dallas, Texas, area. Wood was involved in several of the traps, but was particularly active in a trap located at 2614 Merlin (the "Merlin trap").

The Allen organization, through its complex network of suppliers, obtained cocaine from various sources in Miami, New York, Houston, Los Angeles, and Dallas. The organization consisted of several levels, from sellers,

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[1] Several of his co-conspirators proceeded to trial and were convicted on charges related to this conspiracy.

money counters, and recruiters to on-location managers and higher managers. Money was transported from Dallas to New York City via couriers and Western Union wire transfers. During April and May 1990, the Merlin trap sold one kilogram of crack per day and brought in $100,000 per day.

The government's investigation showed that Wood was a secondary level manager in this organization. Initially a worker at one of the Dallas traps, Wood was eventually allowed to sell his own supply of crack in the Merlin trap and was familiar with the operations of the other Dallas traps. The government, through interviews with witnesses and the trial testimony of other defendants, estimated that while Wood was a part of the conspiracy, the Merlin trap sold between sixteen and one-half to forty kilograms of crack. Furthermore, the Merlin trap sold approximately forty-two kilograms of crack per month in April and May 1990. The government also showed that Wood recruited six workers from the New York area to work in Dallas, with Wood paying for one worker's airfare. Moreover, the government presented evidence that Wood used a gun to facilitate cocaine deals. The government also presented evidence that Wood traveled to Dallas in January 1990 with Anthony Allen for a meeting with suppliers to arrange cocaine shipments.

Wood had other brushes with the law related to the conspiracy before he was apprehended in July 1990. Wood was detained in the Dallas airport in April 1988 when he tried to transport 322.4 grams of cocaine to Dallas. Following a scuffle with police, he escaped, leaving behind the cocaine and identification. Wood was also detained in April 1989 by the New York Port Authority

police at JFK airport who seized $19,010 in cash from him. The police released him without first checking to see if he was wanted.

Wood maintains that in April 1989 he disassociated himself from the organization after he had a dispute with Allen. He claims that he began to distance himself from the organization because of this incident and never returned to Dallas again, except for a brief meeting in January 1990.

II

When Wood pled guilty to the one count of 21 U.S.C. § 846 in October 1993, he also agreed to a factual resume concerning the conspiracy. This resume broadly described the conspiracy, stating that it began around December 1986 and continued until June 1991. The resume also stated that the conspiracy involved several retail outlets in the Dallas area.

The district judge who had presided over the Allen conspiracy trial in October 1993 also conducted Wood's sentencing hearing on February 18, 1994. At this hearing, Wood objected to the presentencing report filed by the government. In its report and at the hearing, the government alleged that drug transactions by Wood's co-conspirators involving between fifteen and forty kilograms of crack cocaine could be attributed to Wood as "Relevant Conduct" under the 1993 United States Sentencing Guidelines ("Sentencing Guidelines") in calculating his base offense level. The government argued for an upward increase in Wood's base offense level for alleged Offense

Characteristics (possession of a firearm) and an Aggravating Role (manager in the conspiracy). The government also recommended a two-point downward adjustment based on Wood's acceptance of responsibility (the guilty plea). The district court agreed with the probation officer's calculation of the base offense level of 42 and increased the level by two points for the firearm possession and two points for Wood's "manager" status for a total of 46. The court then reduced the offense level by two points for Wood's acceptance of responsibility for a final offense level of 44. The court then adjusted the offense level to 43. Having calculated Wood's criminal history as category II, the court sentenced Wood to a term of life imprisonment, a mandatory five-year term of supervisory release following imprisonment, and a $50 mandatory special assessment.

Wood now appeals his life sentence.

III

Wood raises seven points of error allegedly made by the district court in determining his sentence. He first challenges the sufficiency of the evidence to support the district court's finding that fifteen or more kilograms of crack cocaine were attributable to him as relevant conduct under the Sentencing Guidelines. Second, he questions the sufficiency of the evidence to support the district court's finding that he possessed a dangerous weapon during the course and scope of his participation in the conspiracy. Third, Wood contends that there is insufficient evidence to support the district court's finding that he was a "manager" in the conspiracy. Fourth, he

argues that the district court incorrectly calculated his offense level by calculating upward adjustments beyond the offense level of 43, thereby rendering his two-point downward adjustment worthless. Finally, Wood makes several constitutional challenges to his sentence. He argues that his sentence violates the Confrontation Clause of the Sixth Amendment because his sentence was enhanced based on an alleged hearsay statement. He next argues that the Sentencing Guidelines violate the Eighth Amendment's proscription against cruel and unusual punishment because there is a grossly disproportionate leap in the severity of punishment at offense level 43 (life imprisonment) when compared to the incremental increases leading up to offense level 42. Finally, Wood contends that contends that [sic] the sentence in this case violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment because the life sentence imposed upon him is grossly disproportionate to his crime.

We now turn to address each point of error.

IV

A

Wood first challenges the district court's determination of the quantity of cocaine attributable to him as a part of the conspiracy, with this quantity being used to calculate his base offense level. The district court accepted the pre-sentence report's findings that in excess of fifteen kilograms of crack were attributable to him as relevant conduct within the scope of the conspiracy. The base offense level under Sentencing Guidelines

§ 2D1.1(c)(1) was level 42. Wood argues that the amounts of crack distributed by his co-conspirators in 1990 were not within the scope of his conspiratorial agreement, and that the government failed to establish this beyond a preponderance of the evidence. He contends that he had withdrawn from the conspiracy in April 1989 and was in New York during the peak months of April and May 1990. Finally, Wood asserts that mere awareness of such transactions is not enough for sentence enhancement under section 1B1.3 of the Sentencing Guidelines. *See United States v. Evbuomwan*, 992 F.2d 70, 72 (5th Cir. 1993).

Section 1B1.3(a)(1)(B) of the Sentencing Guidelines states that in the case of jointly undertaken criminal activity, the base offense level "shall be determined on the basis of . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction." We have previously held that "[a] district court's findings about the quantity of drugs implicated by the crime are factual findings reviewed under the 'clearly erroneous' standard." *United States v. Rivera*, 898 F.2d 442, 445 (5th Cir. 1990). Under this standard, " '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *United States v. Rogers*, 1 F.3d 341, 342 (5th Cir. 1993) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

The district court considered several sources of information in making its decision. *United States v. Rivera*, 898

F.2d 442, 445 (5th Cir. 1990). In his plea agreement, Wood admitted that he had been part of a conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine and fifty grams or more of crack. In the factual resume, Wood admitted that he was a member of the charged conspiracy, which began about December 1986 and continued until about June 1991. At the sentencing hearing, a government detective offered evidence that based upon trial testimony and cooperating co-conspirator statements, approximately 16 to 42 kilograms of crack were reasonably foreseeable quantities of the drug within the scope of Wood's jointly undertaken criminal activity. Wood objected to this finding, but offered no evidence in rebuttal. Consequently, the court found that based upon a preponderance of the evidence that fifteen kilograms or more of crack were attributable to Wood, agreeing with the presentencing report's calculation of an offense level of 42.

"The district court has broad discretion in considering the reliability of the submitted information regarding the quantities of drugs involved." *United States v. Martinez-Moncivais*, 14 F.3d 1030, 1039 (5th Cir.), *cert. denied*, 115 S.Ct. 72, 130 L.Ed.2d 27 (1994). Credibility determinations in a sentencing hearing "are peculiarly within the province of the trier-of-fact." *United States v. Sarasti*, 869 F.2d 805, 806 (5th Cir. 1989). Moreover, it is proper for a sentencing court to rely on a "presentencing report's construction of the evidence to resolve [a] factual issue, rather than relying on the defendant's version of the facts." *United States v. Beard*, 913 F.2d 193, 199 (5th Cir. 1990).

After considering the arguments, we cannot find that the district court's determination of quantity is clearly erroneous. Although Wood maintains that he was not in Dallas during the period when the Merlin trap was selling one kilogram of crack a day, he made no claims of withdrawal from the conspiracy in his plea agreement. He admitted in his plea agreement that he had been involved in a conspiracy to sell and distribute cocaine and crack from December 1986 to June 1991. Moreover, in January 1990 he attended a high level meeting in Dallas during which members of the conspiracy arranged for more shipments of cocaine, which were to be turned into crack. The agent also presented evidence that during this same period in January, Wood had assisted in converting cocaine to crack for distribution at the Merlin trap. Furthermore, the agent's actual numbers for the Merlin trap were derived from statements taken from cooperating co-conspirators, and the agent had taken special care not to double-count. As an active member of the conspiracy, he remained accountable for his own conduct and the foreseeable acts of his co-conspirators committed in furtherance of the conspiracy. *United States v. Maseratti*, 1 F.3d 330 (5th Cir. 1993). For the foregoing reasons, we affirm the district court's determination of his offense level.

B

Wood next challenges the district court's two-point increase in his offense level for his possession of a dangerous weapon during the conspiracy pursuant to U.S.S.G. § 2D1.1(b)(1). The party seeking an upward

adjustment in the sentence level must prove facts necessary to support the adjustment by a preponderance of the evidence. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990). We review these factual findings for clear error. *Id.* at 966.

Wood acknowledges that the Federal Rules of Evidence do not apply in sentencing proceedings, *see* Fed. R. Evid. 1101(d)(3), but stresses that under the Sentencing Guidelines the information used as a basis for sentencing must have "sufficient indicia of reliability to support its probable accuracy." *See* U.S.S.G. § 6A1.3(a). With these tenets in mind, Wood argues that the district court erred in crediting "hearsay testimony based on an admitted felon's self-serving allegation" as a basis for this upward enhancement. Moreover, he argues that such hearsay testimony should not be credited at a sentencing hearing unless other evidence exists to corroborate the hearsay statement, citing *United States v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993). Although his argument may be appealing, he misreads *Miele*.

The commentary to Sentencing Guideline § 6A1.3 specifically permits consideration of testimony at sentencing hearings that would not be admissible at trial. The commentary states that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. . . . Reliable hearsay evidence may be considered." U.S.S.G. § 6A1.3, commentary (1993). In the sentencing hearing, the detective testified that Wood had possessed a gun during a drug deal based on his interview with one of Wood's co-conspirators. This co-conspirator had appeared and testified as a government witness in the October 1993 trial.

The co-conspirator advised the detective that he had seen Wood "cover" a drug deal in Dallas with a gun during late 1988 or early 1989. This information is plausible because it dovetails with other evidence placing Wood in Dallas at the same time. Moreover, the district judge who presided at Wood's sentencing hearing had also presided at the trial of his co-conspirators; thus, he had the opportunity to observe and evaluate this particular co-conspirator's veracity. Because this information was sufficiently reliable, the district court's finding that Wood possessed a gun during a drug transaction was not clearly erroneous. Therefore, we affirm the district court's two-point enhancement of his sentence.

C

Wood next challenges the sufficiency of the evidence to support the district court's finding that he held the role of a secondary manager in the conspiracy, thereby increasing his offense level by two points under Sentencing Guideline § 3B1.1(c). As the party seeking the sentencing adjustment, the government was required to establish the factual predicate justifying an adjustment by a preponderance of the evidence. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990). Reviewing facts for clear error, we consider whether the district court's factual finding that Wood was a manager is plausible in the light of the record as a whole. *Id.* at 965-66.

The Sentencing Guidelines clearly state that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward

adjustment may be warranted [for a defendant who] . . . exercised management responsibility over the property, assets, or activities of a criminal organization." U.S.S.G. § 3B1.1, cmt. 2. Among the factors to consider in determining the management status of a defendant is whether the person recruited accomplices. *Id.* at cmt. 4.

Wood argues that the government based this manager accusation on a single piece of evidence, that he had managed a cooperating co-conspirator for one week at the Merlin trap in 1987. According to the Sentencing Guideline commentary, this information alone would be enough to classify him as a manager. The government, however, presented more evidence that established that Wood was a manager. From interviews with his accomplices, the detective determined that Wood began working as a runner, was elevated to a manager at the traps, helped obtain cocaine, and collected money from sales at the traps. Finally, the government presented evidence that while in New York Wood recruited workers for the Dallas traps, even providing money for one worker's airfare. Considering the culpability of this evidence, the district court clearly did not err in determining that Wood was a secondary manager in this conspiracy, and, consequently, the two-point enhancement was proper.

D

Wood next focuses his arguments on the downward adjustment the district court made for his acceptance of responsibility. We review *de novo* the determination of legal principles utilized in arriving at a guideline sentence. *United States v. Mourning*, 914 F.2d 699, 704 (5th Cir.

1990). Wood argues that in granting him a two point downward adjustment under Sentencing Guideline § 3E1.1(a), the court improperly calculated his offense level, thereby depriving him of any meaningful benefit in the reduction. Specifically, the district court calculated Wood's base offense level at 42, then added two points for possession of a weapon, then added two more points for manager status, for a total of 46. The district court then reduced his offense level from 46 to 44 for his acceptance of responsibility. Finally, the court reduced this offense level to 43, pursuant to Sentencing Guidelines chapter 5, part A, application note 2.

Wood argues that the court erred because application note 2 to the Sentencing Table states that "[a]n offense level of more than 43 is to be treated as an offense level of 43." This note, he contends, demonstrates that the district court erred in computing his sentence because it computed enhancements above the level of 43. He asserts that a plain reading of this commentary does not allow any offense level to add up to more than 43. As a result, once a defendant's base offense level exceeds 43, all downward adjustments must proceed from level 43. Therefore, the court should have computed his offense level to be 43, then given him the two-point reduction for acceptance of responsibility for a total of 41. Thus, he would have been accorded a meaningful benefit for his acceptance of responsibility.

Despite his insistence, Wood, nevertheless, misreads the Sentencing Guidelines. We have previously discussed the order in which a sentence must be calculated, finding that under the Application Instructions of section 1B1.1 the district court must first determine the base offense

level, then make any upward adjustments, and finally make any adjustments for acceptance of responsibility. *United States v. Reyes*, 881 F.2d 155, 156 (5th Cir. 1989). Moreover, the Second Circuit has recently faced an identical argument in *United States v. Caceda*, 990 F.2d 707, 710 (2d Cir.), *cert. denied*, 114 S.Ct. 312, 126 L.Ed.2d 259 (1993). The *Caceda* court characterized an argument identical to Wood's as proposing a "perverse" result. We agree. As the *Caceda* court stated,

> [w]e believe it evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43. Otherwise, a more culpable offender, say, a defendant whose conduct would yield a level of 50 who was entitled to a downward adjustment of 2, would receive a total offense level of 41, while a less culpable defendant with a level of 43 and no applicable upward or downward adjustments would get a higher sentence.

Id. We therefore hold that the district court did not err when it reduced Wood's offense level for his acceptance of responsibility from his total offense level of 46, rather than from his final adjusted offense level of 43. Although the Sentencing Guidelines cannot be championed as a model of clarity and simplicity in statutory language, we are firmly convinced that a reading of the Guidelines as a whole does not allow for such a twisted result as Wood proposes. Accordingly, we affirm the district court's determination of his sentence.

E

(1)

We now turn to Wood's several constitutional challenges to his sentence under the Guidelines. He first contends that because facts established at the sentencing hearing directly affect the determination of a defendant's sentence, the full requirements of the Confrontation Clause of the Sixth Amendment should be employed at the sentencing hearing to ensure the protection of the defendant's constitutional rights. Although acknowledging that the Sentencing Guidelines explicitly permit a sentencing court's consideration of hearsay testimony, Wood, nevertheless, challenges the constitutionality of the district court's application of the Guidelines in this case.

We are reminded that 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The Sentencing Guidelines also state that "[i]n resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a) (1993). Moreover, a "defendant's confrontation rights at a sentencing hearing are severely restricted." *United States v. Rodriguez*, 897

F.2d 1324, 1328 (5th Cir.), *cert. denied*, 498 U.S. 857, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990)

Wood specifically challenges the information provided to the detective by his co-conspirator, which showed that Wood used a gun during a drug deal. Wood bore the burden of demonstrating that this information could not be relied upon because it was materially untrue, inaccurate, or unreliable. *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991). He was given an opportunity to respond, and he did not present any evidence to show that this information was unreliable, other than attacking the co-conspirator's credibility. Because the court did not foreclose his opportunity to confront and cross-examine the detective about the basis for his information, Wood's Sixth Amendment rights were not denied at this sentencing hearing. *United States v. Byrd*, 898 F.2d 450, 453 (5th Cir. 1990). We therefore affirm the district court's determination of his sentence and hold that his confrontation rights were not violated. *See Rodriguez*, 897 F.2d at 1328.

(2)

Wood next challenges his sentence as determined by the Sentencing Guidelines, arguing that the mandatory imposition of life imprisonment at level 43 violates the Eighth Amendment's proscription against cruel and unusual punishment. He contends that the automatic life sentence at level 43 is unconstitutional because the Guidelines impose incremental increases in the length of imprisonment from level 1 to 42, then the sentence range inexplicably leaps to life at 43. Wood also argues that his

life sentence violates the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment because his life sentence is disproportionate to his crime.

The Supreme Court has upheld the constitutionality of the Sentencing Guidelines. *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647 (1989). In evaluating a sentence under the Eighth Amendment, we determine only whether the sentence with [sic] within constitutional limits. *United States v. Sullivan*, 895 F.2d 1030, 1032 (5th Cir.), *cert. denied*, 498 U.S. 877, 111 S.Ct. 207, 112 L.Ed.2d 168 (1990). Because the district court complied with the Sentencing Guidelines in imposing Wood's sentence and his sentence is within the applicable guideline range, we find no Eighth Amendment violation. *Id.*

V

We will close by summarizing our holding. We affirm the district court's determination that 15 or more kilograms of cocaine were attributable to Wood as relevant conduct, that Wood possessed a dangerous weapon during the course and scope of this conspiracy, and that Wood was a manager within the conspiracy. Moreover, we hold that the district court correctly computed Wood's offense level by deducting the two points for his acceptance of responsibility from his final offense total of 46. Finally, we hold that his sentence does not violate either the Confrontation Clause of the Sixth Amendment nor Eighth Amendment's proscription against cruel and

unusual punishments. For the foregoing reasons, Wood's life sentence imposed by the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOWARD WASHINGTON WOOD,
a/k/a "Skelly",

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(Filed Mar. 8, 1995)

Before GOLDBERG*, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

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*Due to his death on February 11, 1995, Judge Goldberg did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. §46(d).

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge